

In the  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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No. 11639

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C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a Corporation, *Appellee,*  
vs.

HANSEN & ROWLAND, INC., a corporation,  
*Appellant.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

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HONORABLE CHARLES H. LEAVY, *Judge*

---

**PETITION FOR REHEARING**

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FILED

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## TOPICAL INDEX

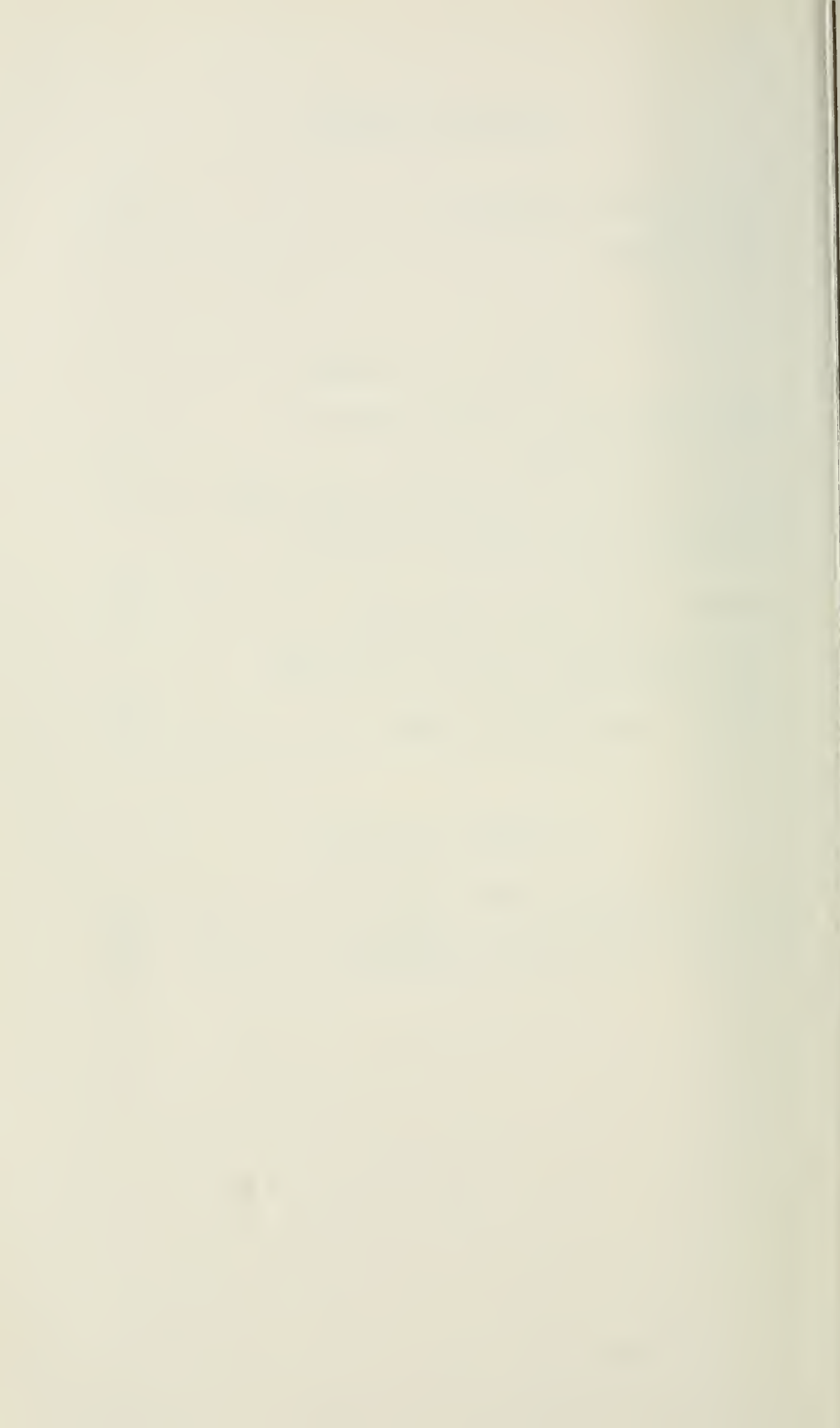
The Question of Interest-----	Page 10
Res Judicata-----	13

## TABLE OF CASES

<i>Baltimore S. S. Co. v Phillips</i> 308 U.S. 371, 84 L. Ed. 329-----	14
<i>Bates v. Bodie</i> 245 U.S. 520 62 L. Ed. 444-----	15
<i>Cromwell v. Sac. County</i> , 94 U.S. 351, 24 L. Ed. 1991-----	15
<i>Outram v. Norewood</i> , 3 East 346-----	15
<i>Town of Beloit v. Morgan</i> , 74 U.S. 619, 19 L. Ed. 205-----	16
<i>Witte vs. Bank</i> , 129 W.D. 650-----	17

## MISCELLANEOUS

Am. Jurisprudence 30 P. 823-4-----	14
Rule 26 Circuit Court of Appeals-----	13



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Appellant petitions the Court for a rehearing  
herein on the following grounds:

- (1) The Court erred on the facts regarding  
the premium base;
- (2) The Court erred in failing to apply long  
established, correct rules of law in deter-  
mining the right of Appellant to recover  
interest under the doctrine of *res judicata*.

The foregoing will be discussed in the order presented.

In the course of its opinion this court said:

“Assuming that appellees had not fulfilled their contractual duty of furnishing proper payroll records to appellant and that the alternative 50% of entire contract cost provision was applicable, the burden of proof would nevertheless remain with appellant to establish the amount of contract cost.”

There is no dispute as to total contract cost; it was \$1,055,214.02. There was but one contract and one bond.

The travel time of \$15,168.64 and \$137,932.80 applied to the work involved on the \$1,055,214.02 total.

This Court proceeds:

“But the express condition in the policy upon which the alternative 50% of entire contract cost provision became operative, was that the remuneration of the contractors’ employees be ‘not available to the Company’—a condition which was not established by appellant at the hearing.”

It is true payrolls covering the entire amount were supplied to appellant, and are in evidence. Appellees were able to break them down to the extent of showing the travel time. Beyond that they could not go.

In the interest of fairness and accuracy please

read Mr. Polk's uncontradicted testimony found at pages 540-541 of the Transcript; it follows:

## DIRECT EXAMINATION

By Mr. Sager:

Q. Now, Mr. Polk, you testified this morning that there were some work on the part of all of these various contractors in unloading and transporting their equipment from Valdez into the job.

A. Yes.

Q. *Would there be any means of determining the actual and accurate payroll of those men upon that type of work?*

A. *No, there is no way that you can determine it mathematically correct.*

Q. Have you given consideration to the matter and arrived at an estimated figure of what that payroll would be?

A. Yes. (64)

Q. What was that figure? A. \$35,000.

Q. And that would be for all the men of all the contractors, exclusive of Weldon Brothers and Dusenberg? A. Yes.

Q. And that figure would cover both the unloading and the transportation? A. Yes.

Q. —to the job. Now likewise you testified this morning that some of the men were used upon Section A-3 in maintaining that section of the highway. *Would there be any way of determining accurately the number of men or the payroll attributable to them while engaged in that maintenance work?*

A. *No, there wouldn't.*

Q. And have you given consideration to an estimate of that figure for the period covered by the policy?

A. Yes, I have.

Q. What is that figure?

A. In dollars it amounts to twenty-two thousand, five hundred and ninety-four.

Q. And are those estimates in your judgment a fair estimate of the total of the amount of money expended in payroll for those two—or for that work?

A. Yes, that does not include the Dusen-berg nor Weldon. (65)

Q. The maintenance figure you gave. It excludes those?

A. It excludes those, yes.

Mr. Peterson: I understand, Mr. Sager, the computation—did you state that it was furnished you by the Attorney General's office, the computation? I just wanted to show the source, is all.

Mr. Sager: It came to me from the Attorney General's office, but it was computed in the office of the Public Roads Administration.

The Court: Well, now are these figures of \$35,000 for Valdez and \$25,594 for work on Section 3,—maintenance section? You say exclusive of the employees of the two contractors who had the sub-contract on Sections 1 and 2?

The Witness: Yes, sir.

If this uncontradicted testimony of an intelligent witness in a better position to know than anyone else, did not establish, beyond range of contro-

versy, the fact, that the necessary payroll information was not, and could not be made available to Underwriters, then we confess a lamentable misunderstanding of the value and weight of evidence.

Why disregard the testimony of Mr. Polk for whose testimony appellee vouches? He was the government's engineer in charge of the work and probably in a better position to give the facts than any other person.

The contract provided that appellee would keep "such records as are necessary for the computation of earned premium." In default of which the 50% alternative would become operative.

Why talk about the burden being on appellant to show the amount when appellee itself says "there would be no way of showing the actual payroll." Could appellant be reasonably expected to "establish" anything different?

The Court continues:

"There is an even more apparent defect in appellant's present argument. Invocation of the 50% of total contract cost provision as to \$654,-075.25 of total wages paid, as appellant would have it, would necessarily encompass in the premium base remuneration for work not done in connection with Sections A-1 and A-2. This we have already held cannot be done because of the specifically restricted coverage of the policy. Appellant's formula for computation arrives at a premium base which is equally as improper

as the base which we have heretofore explained and held must be condemned.”

The opinion of this court on the first appeal was based on the facts as then understood. The subsequent hearing clearly showed an entirely different situation calling for a different understanding entitling appellant to relief and anything said in the first opinion should not operate to defeat such right.

The work excluded from the premium base was done under the principal contract between Lytle-Green and the Government, which was extended to include Sections other than A-1 and A-2.

The very purpose of the provisions of the insurance contract was to provide against just such contingencies, which it was foreseen might arise.

To reach the result arrived at, it seems to us that this Court could take no other course than to ignore the plain terms of the contracts made by the parties and the testimony of appellee's witness Polk, whose testimony seems to have been accepted 100% by this court on every other phase of the case.

## THE QUESTION OF INTEREST

- (2) The Court erred in failing to apply long established correct principles of law with respect to *res judicata* on the question of interest.

Original judgment entered September 2nd, 1944, providing for interest from Sept. 2nd, 1942 (Tr. 29).

In their opening brief (P. 6. first appeal) Counsel for appellants say:

“The defendants contended that the million odd dollars of alleged payroll upon which the premium was claimed was not the payroll of employees of the contractors but was the payroll of government employees. They further contended that if the workmen be considered employees of the contractors, that the payroll upon which the premium was claimed was far in excess of the payroll attributable to premium since only two of the contractors actually worked upon the section of the Alaska Highway designated in the policy during the period of coverage, and that the only payroll upon which premium should have been determined was the payroll of these two contractors, amounting to \$90,053.81.”

This Court followed the trial court in holding that the workmen were employees of the contractors, and continued:

\* \* \*

“This change of plans, added to the blocking off of the A-1 and A-2 sections by military deployment, caused the principal personnel resources of appellants, as was testified by the government field engineer, to be ‘diverted to this other job’ of construction on the A-4 highway section farther north and inland toward Fairbanks. Only two of the fourteen associated unit contractors, with a total payroll of \$90,053.81, of the total payroll of \$1,055,214.02 on which the district court based the policy prem-

ium, worked on the A-1 and A-2 sections during the coverage period.

\* \* \*

“Thus work done outside the specified sections of road was therefore not within the policy, and the general payrolls covering work done elsewhere cannot properly be used as a part of the premium base.”

\* \* \*

“The judgment of the district court awarding the full premium claimed must be reversed. An issue appears to be presented as to whether some part of that section of the payroll representing wages of workers traveling to Alaska prior to assignment comes within the premium base. The cause will be remanded for the taking of such evidence on this or other issues as may be necessary for the entry of a judgment for premiums due in conformity with the views herein expressed as to the policy’s coverage limitation.” (151 Fed. 2nd. 576)

Let’s pause for a moment to analyze the quoted language for the purpose of determining its legal effect: Would any man, lawyer, or layman construe it as reversing the judgment of the lower Court allowing premium on the \$90,053.81 for “payroll on the A-1 and A-2 sections during the coverage period”?

If it were not intended to allow the recovery of premium on \$90,053.81 in accordance with the judgment of the trial Court to stand, why use the lan-

guage, "The judgment of the District Court awarding the *full premium claimed* must be reversed"?

The decision with respect to this item even disregards this Court's own rule 26 as follows:

### Interest

"1. In actions at law where an appeal is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered."

### RES JUDICATA

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On this subject this Court said:

"The authorities cited by appellant to the effect that whatever has been decided on one appeal is *res adjudicata* on a subsequent appeal in the same suit, unquestionably state the law. However, the conclusive answer to appellant's contention is that on the prior appeal in this case, the matter of interest was not raised by the parties and was not considered, discussed or decided by this court. Appellant's attempt to ascribe some significance regarding interest to the implied approval in our earlier opinion of the \$90,053.81 amount as part of the premium base, is without merit."

This Court's conclusion that "the conclusive answer to appellant's contention is that on the prior appeal in this case the matter of interest was not

raised," etc., is but a half-statement of the rule well illustrated by the following:

"The phase of the doctrine of *res judicata* precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, *but also to other matters which could properly have been determined in the prior action.* This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense, which could have been presented by the exercise of due diligence."  
30 Am. Jurisprudence, pp 923-4.

"Where a second action is on the same cause of action and between the same parties as a first action, the judgment in the former action is conclusive in the latter as to every question which was or might have been presented and determined in the former.—*Baltimore S. S. Co. v. Phillips*, 47 S. Ct. 600, 274 U. S. 316, 71 L. Ed. 1069."

"*Res judicata* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end.—*Chicot County Drainage Dist. v. Baxter State Bank*, 60 S. Ct. 317, 308 U. S. 371, 84 L. Ed. 329, reversing 103 F. 2d 847."

"An estoppel by judgment extends not only to every matter which was offered or received to sustain or defeat the claim or demand, but

any other adminissible matter which might have been offered for that purpose.—*Bates v. Bodie*, 38 S. Ct. 182, 245 U.S. 520, 62 L. Ed. 444.”

“Where the parties and cause of action were the same as in a prior suit, and every objection urged in the subsequent suit was open, within the legitimate scope of the pleadings in the first suit, and might have been presented at that trial, the matter would be considered as having passed in rem judicatam, and the former judgment would be deemed conclusive between the parties.—*Gould v. Evansville & C. R. Co.*, 91 U.S. 526, 23 L.Ed. 416.”

“It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.”

*Outram v. Morewood* 3 East, 346, quoted by Field J. in *Cromwell v. Sac. County* 94 U.S. 351; 24 L. Ed. (Op. 1991).

“If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided.

If the second action was upon a different claim or demand, then the judgment is an estoppel “only as to those matters in issue or points controverted, upon which the finding or verdict was rendered.”

*Bates v. Bodie* (supra)

*Cromwell v. Sac. County* 94 U.S. 351; 24 L. Ed. 195-198

In our case the item of interest was in issue, controverted and judgment rendered.

In *Town of Beloit v. Morgan*, 74 U.S. 619, 19 L. Ed. 205, the Supreme Court said:

“On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject matter, though the *res* itself may be different.

“An apt illustration of this principle is found in *Gardner v. Buckbee*, 3 Cow., 120. Gardner bought a vessel from Buckbee, and gave two notes for the purchase money. Buckbee sued him upon one of the notes in the Marine Court. Gardner set up as a defense, fraud in the sale and a want of consideration. A verdict and judgment were rendered in his favor. In a suit upon the other note, in the Common Pleas of the City of New York, the judgment in the Marine Court was held to be an estoppel upon the subject of fraud in the sale. *Bouchard v. Dias*, 3 Den., 238; *Doty v. Brown*, 4 N. Y., 71, and *Babcock v. Camp*, 12 Ohio St. 11, are to the same

effect and equally cogent. Such has been the rule of the common law from an early period of its history down to the present time. *Ferrar's case*, 6 Co., 8; *Hitchen v. Campbell*, 2 W. Bl. 831; *Duchess of Kingston's case*, 2 Sm. L. Cases, 656; *Aurora v. West* (ante, 42); see, also *Birckhead v. Brown*, 5 Sandf. S.C., 135. But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented."

The Supreme Court of the State of Washington in a recent case (Feb. 4th, 1948) *Witte v. Bank*, 129 W. D. 650 (enbanc) said:

"As early as *Sayward v. Thayer*, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137, it was stated:

'The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

"That rule has been steadfastly adhered to and followed in this state." (Citing a large number of cases.)

It is simply begging the question to say that the first decision of this Court *reversed* the judgment of the trial Court as to premium on the \$90,053.81 item.

This action was one to recover certain premiums *with interest* (Complaint Tr. 72).

Stripped of extraneous matters which may tend to confuse, we have this factual situation: On September 22nd, 1944, Hansen & Rowland recovered judgment against Lytle-Green for premium on \$90,053.81, which judgment provided that the amount of recovery bear interest at the rate of six per cent per annum from September 1st, 1942. On appeal to this Court, this judgment of the lower Court was affirmed, the cause was remanded to the trial Court, (not to do anything to disturb or affect the judgment for premium with interest on the \$90,053.81 item), but to take further evidence as to the amount of payroll on travel time, and unloading and moving equipment prior to the diversion of workmen and equipment to Sections other than A-1 and A-2, plus payroll incurred in opening Section A-3 to give access to Sections A-1 and A-2.

We submit that the foregoing is an accurate, fair statement based on the record, to which, in all fairness, this Court should apply the law.

That this Court entirely misconceived the question involved and presented on this phase of the case is clearly apparent from its opinion:

“However, the conclusive answer to appellant’s contention is that on the prior appeal in this case, the matter of interest was not

raised by the parties and was not considered, discussed or decided by this court. Appellant's attempt to ascribe some significance regarding interest to the implied approval in our earlier opinion of the \$90,053.81 amount as part of the premium base, is without merit."

The principle of *res judicata* applies in all its vigor to the original judgment of the trial Court allowing a recovery with interest, a part of which judgment and recovery was affirmed by this Court on the first appeal. Be that as it may, this Court fell into grievous error in assuming, that with respect to its prior opinion, *res judicata* applied only to questions raised and argued, and did not extend to other matters falling within the purview of the original action *which might have been presented and determined*.

Lytle-Green prosecuted the prior appeal and did not question the award of interest from Sept. 1st, 1942, therefore no duty devolved on Hansen & Rowland to mention it.

Whether or not, this Court mentioned interest in its earlier opinion, is unimportant as long as it did not reverse the recovery of premium on the \$90,053.81 item. When that decision became final no Court had a right to disturb it. See cases cited PP 36-37 Appellants Brief.

We endeavored to make this clear in our open-

ing brief, even setting forth the pertinent portion of the judgment of the lower Court (pp. 34-35 App. Brf).

This case has consumed considerable time of this Court and of Counsel, as well. Naturally we hesitate to file this Petition; however, regardless of time and effort, Appellants are entitled to have their rights adjudicated and settled in accordance with long established, long settled general rules and general principles of law.

It seems to us well nigh impossible, for a litigant to make a plainer, clearer case for relief, than has been made here.

We most earnestly and respectfully submit that a rehearing be granted herein.

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